ECORD
AND
RIEF

No. 16-405

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Writ of Certiorari
To The Supreme Court of Montana

BRIEF OF *AMICUS CURIAE* ACADEMY OF RAIL LABOR ATTORNEYS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE* ACADEMY OF RAIL LABOR ATTORNEYS[1]

The Academy of Rail Labor Attorneys ("ARLA") is a professional association of attorneys founded in 1990 whose practices include the representation of injured railroad workers in cases filed under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et. seq.* and the federal railroad whistleblower law, 49 U.S.C. § 20109. ARLA's primary purposes are to promote rail safety for the traveling public, to promote safe working conditions and standards for railroad employees, to promote public safety with respect to rail transportation at grade crossings and in connection with rail passenger and commuter service, to promote the rendering of whatever aid, comfort or assistance may be required by an injured railroad employee or his or her family, to provide continuing legal education for ARLA's members through seminars and other educational programs, and to promote and maintain high standards of professional ethics, competency and demeanor in the bench and bar.

SUMMARY OF ARGUMENT

1. It is noteworthy that in only a few cases in almost 100 years since 45 U.S.C. § 56 was enacted, has a railroad even questioned before this Court that the section did not meet due process requirements for

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have filed consents to the filing of *amicus* briefs.

personal jurisdiction in a state court. In such cases, this Court concluded that railroads were subject to personal jurisdiction in a state court where the railroad is transacting business.

Regarding 45 U.S.C. § 56, ARLA fully supports the arguments set forth by Respondents. Alternatively, we believe that this Court, also, may decide this case based upon the principle that this Court will examine the statute with reference to the common law at the time section 56 was enacted. Based upon the state of the law when § 56 was enacted in 1910, this is a valid reason why it was not necessary for Congress to specifically address personal jurisdiction in state courts by amending this aspect of common law in the FELA. Except as abrogated by Congress in the FELA, common law should govern its interpretation, including personal jurisdiction, as it existed when the law was enacted.

2. If this Court adopts the position of BNSF, it will create chaos in the railroad industry, and the only realistic forum for a FELA plaintiff would be the location of the accident. That would be so, even though it could be up to 1000 miles away from the home of a maintenance of way employee, or several hundred miles away for an operating crew. For an operating crew, his/her schedule depends on how far the crew can operate a train within 12 hours. As pointed out by the Federal Railroad Administration in a 2006 study, some maintenance of way employees, many times, travel distances of up to 1000 miles to reach their worksite.

The BNSF Railroad is incorporated in Delaware and operates in 28 states and the British Columbia,

with its principal offices located in Ft. Worth, TX. It would place an unconscionable burden on these BNSF employees to be forced to file the FELA claim far distances away, or in Delaware (state of incorporation), or Ft. Worth (principal place of business). It is even more burdensome in that BNSF doesn't even operate in Delaware. Accidents involving operating road crews and maintenance of way production crews rarely occur near the crew member's home terminal. In most cases, the witnesses of railroad employee accidents/incidents are members of the same crew as the injured employee. And these crew members, likely, live in the same general area as the injured co-worker. Except for initial emergency treatment, the medical witnesses are located near the injured person's home. To force the crew members and the treating medical care personnel to travel many miles to a far away court would be ridiculous, and not in the interests of justice.

Moreover, if this Court adopts the position of the railroad, it would place a tremendous burden on a few courts. For example, three of the largest seven Class One railroads in the country, BNSF, Union Pacific, and Kansas City Southern, are incorporated in the state of Delaware. Among these three railroads, during the past three calendar years, there were 5,109 casualties to on duty railroad employees. Each casualty is a potential FELA case. If the lawsuits were brought in Delaware, it would overly burden one particular state court, located in Kent County. There are three counties in Delaware, and only Kent County courts allow court costs to be assessed against the losing party. Therefore, the FELA lawsuits would likely be brought there.

3. Beginning with the Magna Carta, fairness is the fundamental basis of the Constitution and the Bill of Rights. Fairness cannot be accomplished if the railroad's position is adopted.

Congress, in adopting the 45 U.S.C. § 56, took into consideration constitutional due process. In establishing the statutory jurisdiction over railroads in FELA cases, Congress recognized the uniqueness of railroad operations, and the unfairness of requiring injured railroad employees to bring lawsuits only where the railroad is incorporated or at its principal place of business. It contemplated the due process concerns, and enacted the rights of employees in order to eliminate the necessity of courts from addressing these rights each time a case was filed.

The legislative history clearly supports that a FELA case may be brought wherever the railroad is doing business. In the House Report, it states:

> . . . to permit it to be a practical barrier to the maintenance of an action for death or personal injuries of employees who may be presumed to be unable to meet the expense of presenting their case in a jurisdiction far from their homes would be an injustice too grave and serious to be longer permitted to exist.

The fact that the law as to personal jurisdiction may have changed over time should not have any impact on how the FELA is interpreted today. This Court should be guided by the state of the law when FELA was enacted. At the time of enactment of the FELA, a corporation could be sued in any forum where it owned property or does business.

In several cases, this Court has approved the above statutory provision by allowing the FELA plaintiff to sue the corporation at any point or place or state where it is actually carrying on business, and Congress rejected proposals to limit such jurisdiction.

ARGUMENT

I. TO ADOPT THE RAILROAD'S POSITION, WOULD CREATE CHAOS IN THE INDUSTRY.

1. It is noteworthy that in only a couple of cases in over 100 years since 45 U.S.C. § 56 was enacted, has a railroad even questioned before this Court that the section did not meet due process requirements for personal jurisdiction. In these cases, soon after enactment of 45 U.S.C. § 56, this Court concluded that railroads were subject to personal jurisdiction in a state court where the railroad is transacting business. This Court would have dismissed these cases for lack of jurisdiction, if it determined that the facts did not meet due process requirements. Based upon the state of the law when § 56 was enacted in 1910, this is a valid reason why it was not necessary for Congress to specifically address personal jurisdiction in a state court by amending this aspect of common law in the Federal Employers' Liability Act. Except as abrogated by Congress in the FELA, common law should govern its interpretation, including personal jurisdiction as it existed when the law was enacted.

In *Denver & Rio Grande Western R.R. v. Terte*, 284 U.S. 284 (1932), this Court held that a court of a state where a foreign railroad corporation is authorized to do business, owns and operates part of its lines, maintains an office, and has agents for the transaction of

its general business has jurisdiction of a suit against the company in damages for personal injuries under the Federal Employers' Liability Act, brought by a resident upon a cause of action which arose in another state when he was residing there. *Id.* at 287. In *St. Louis Southwestern Ry., v. Alexander*, 227 U.S. 218, 226 (1913), this Court said "A long line of decisions in this Court has established that, in order to render a corporation amendable to service of process in a foreign jurisdiction, it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof." (citations omitted.). The railroad had offices in New York, which this Court deemed sufficient for personal jurisdiction over it. *See also, Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264 (1917), where this Court held that a railroad which did not own or operate any part of its railway or holding other property within the state may not be said to be doing business there. *Id.* at 265. This is a further reason why it was not necessary for Congress to specifically address personal jurisdiction by amending this aspect of common law in the FELA. Still, we believe that 45 U.S.C. § 56 is broad enough to encompass personal jurisdiction. *See, infra* 13.

If this Court felt that § 56 was not sufficient to provide personal jurisdiction, it would have so stated in the above decisions. The United States, in its *amicus* brief at 9-13, argues that failure of Congress to provide for service of process in § 56 means that a railroad is not subject to personal jurisdiction in the state courts. Based upon the cases decided by this Court as to personal jurisdiction over railroads, that argument is invalid.

2. Some background information about the potential impact of following the BNSF's position is relevant. The BNSF argues FELA lawsuits against it should be filed only where an accident occurred, where the railroad is incorporated, or the location of its principal place of business. (Pet. Br. 18). As addressed herein, if the railroad's position is adopted, the only realistic forum for a FELA plaintiff would be the location of the accident. That would be so, even though it could be up to 1000 miles away from the home of a maintenance of way employee, or several hundred miles away for an operating crew. For an operating crew, it depends on how far the crew can operate a train within 12 hours.[2] The railroad is incorporated in Delaware and operates in 28 states and the British Columbia, with its principal offices located in Ft. Worth, TX. It has over 32,500 miles of track in the U.S. and Canada (Pet. Br. 9). The BNSF system is divided into various divisions, each covering several states. The significance of the divisions is that operating crews may perform services throughout a division on any particular day. For example, an interdivisional run on the BNSF can cover up to 300 miles.

The job duties of operating employees and maintenance of way employees frequently require them to travel hundreds of miles away from their homes. As pointed out by the Federal Railroad Administration in a 2006 study,[3] some maintenance of way employ-

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[2] The Federal Hours of Service Act limits a railroad operating crew from performing services more than 12 hours in a shift. 49 U.S.C. § 21103.

[3] Final Report, *Work Schedules and Sleep Patterns of Railroad Maintenance of Way Workers* , Federal Railroad Admin-

ees, many times, travel distances of up to 1000 miles to reach their worksite. *Id.* at 7. This requirement resulted from a decision of Presidential Emergency Board 291 in 1991, which allowed railroads to utilize track construction crews system wide. Even non-construction crews (which perform inspection, maintenance, and repair work) job territory may encompass several hundred miles. *Id.* at 8. Previously, construction crews were assigned to a specific geographic region. *Id.* at 7. The Report also pointed out that travel by a maintenance of way employee is usually done on his/her day off "because it requires substantial time that cannot be accommodated on a workday." *Id.* at 26. It would place an unconscionable burden on these BNSF employees to be forced to file the FELA claim far distances away, or in Delaware (state of incorporation) or Ft. Worth (principal place of business). It is even more burdensome in that BNSF doesn't even operate in Delaware.

There are demonstrable burdens in restricting the forum as BNSF seeks. Accidents involving operating road crews and maintenance of way production crews rarely occur near the crew member's home terminal. In most cases, the witnesses of railroad employee accidents/ incidents are members of the same crew as the injured employee. And these crew members, likely, live in the same general area as the injured co-worker. Except for initial emergency treatment, the medical witnesses are located near the injured person's home. To require the crew members and the treating medical care personnel to travel

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istration, Office of Research and Development, DOT/FRA/ ORD-06/25 (December 2006).

many miles to a far away court would be ridiculous, and not in the interests of justice.

Another practical problem exists in determining the location of a railroad's "principal place of business". For example, AMTRAK's business offices are located in Washington, D.C., but its dispatching facilities are in Philadelphia. Various railroads operate this way.

3. Moreover, if this Court adopts the position of the railroad, it would place a tremendous burden on a few courts. For example, three of the largest seven Class one railroads in the country, BNSF, Union Pacific, and Kansas City Southern, are incorporated in the state of Delaware. Among these three railroads, during the past three calendar years, there were 5,109 casualties to on duty railroad employees.[4] Each casualty is a potential FELA case.[5] If the lawsuits were brought in Delaware, it would overly burden one particular state court, located in Kent County. There are three counties in Delaware, and only Kent County courts allow court costs to be assessed against the losing party. Therefore, the FELA lawsuits would likely be brought there.

The Norfolk Southern Railroad demonstrates another example of placing an undue burden on local courts. During the past three calendar years, there were 1,048 casualties on the railroad. Norfolk Southern is incorporated in Virginia, and its principal place of business is located in Norfolk, Virginia. The poten-

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[4] Source: Federal Railroad Administration, Office of Safety Analysis, 2.04 "Employee on Duty Casualties."

[5] The statute of limitations for a FELA case is three years.

tial burden on Virginia's courts, as well as other courts, cannot be disregarded.

4. ARLA agrees with the Respondents that there is personal jurisdiction over BNSF under this Court's existing due process jurisprudence. However, in view of the above practical problems which would be encountered by the railroad's position, we request that this Court revisit fairness under the due process clause. As Justice Sotomayor stated in her concurring opinion in *Daimler AG v. Bauman*, 134 S. Ct. 746, 768 (2014), the concept of reciprocal fairness is the touchstone principle of due process in this field. A historical perspective is relevant in making this Court's determination in the present case. The cornerstone of the 5th Amendment and the 14th Amendment protection of due process is fairness. Beginning with the eight centuries' old Magna Carta, which encompassed due process, fairness is the fundamental basis of the Constitution and the Bill of Rights. In an opinion by Justice Joseph Story, this Court first cited the Magna Carta in 1819, in *The Bank of Columbia v. Okely*, 17 U.S. 235, with numerous references of Magna Carta in subsequent opinions. Justice Story later pointed out in one of his commentaries that the guarantee of due process is "but an enlargement of the language of the Magna Carta."[6] Fairness was the reason that the Magna Carta was established. It was developed to protect persons from the tyranny during King John's reign. In 1354, during King Edward III's reign, the phrase "due process of law" first appeared in the Magna Carta's

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[6] Book III, *Commentaries on the Constitution of the United States*, Vol. 2 § 1789, 534 (1873).

guarantee of certain freedoms. Of course, the issue of whether a railroad must be sued only where the accident/incident arose, where the railroad is incorporated, or at its principal place of business, did not arise until recent years.

The Federalist papers embody the same principles of fairness as set forth in the Magna Carta. In discussing due process in the Federalist Paper No. 84, Alexander Hamilton did not specifically mention procedural due process. However, it centered upon fairness. As stated in *U.S. v. Wong Kim Ark*, 169 U.S. 649, 654 (1898), "The language of the Constitution, as has been well said, could not be understood without reference to the common law." *See also*, *Michigan v. Michigan Trust Co.*, 286 U. S. 334, 343 (1931). In the FELA context, this Court applied the common law negligence principles in deciding *Norfolk Southern Ry. v. Sorrell*, 548 U.S. 158, 166 (2007). In a Congressional Research Service report for Congress, *Statutory Interpretation: General Principles and Recent Trends*, Order No. 97-589 (Dec. 19, 2011), it pointed out that "Congress is presumed to legislate with knowledge of existing common law. When it adopts a statute, related judge-made law (common law) is presumed to remain in force and work in conjunction with the new statute absent a clear indication otherwise." p. 19. Additionally, "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Id.*

This Court has long recognized that procedural due process is based upon fundamental fairness. In

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), this Court emphasized that state court jurisdiction over absent defendants is whether the exercise "offends notions of fair play and substantial justice." In *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), it held that due process is violated ". . . if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." And this Court has noted that the due process test includes administrative burdens that the additional or substitute procedural requirements would entail. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), (cited with approval in *Wilkinson v. Austin*, 545 U.S. 209, 211 (2005)). *See also*, *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting); *Daniels v. Williams*, 474 U.S. 327, 331-2 (1986).

Personal jurisdiction over BNSF, in the various states where it operates, does not create any significant burdens on the railroad, when balanced against the burdens on some courts and plaintiffs [as discussed, *supra*, at 5]. The railroad has significant continuous and systematic contacts with the state, so as to render it essentially at home in Montana. *See*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

In situations where the railroad has significant operations within a particular state, it would be unfair to require plaintiffs to travel many miles to file a FELA action. There is no real contest, when balancing the fairness between the costs and burdens to an individual railroad worker, versus the limited costs and burdens of a railroad to be sued where the railroad con-

ducts its operations.[7] In fact, in many cases, because of the location of witnesses, it would be a greater burden on the BNSF for a lawsuit to be filed in Delaware or Ft. Worth, Texas. Modern transportation and communications make it much less burdensome on a railroad to be sued where it has substantial operations.

II. THE APPLICABLE STATUTE IS CLEAR AS TO THE STATE'S TRIAL COURTS' JURISDICTION.

Congress, in establishing the statutory jurisdiction over railroads in FELA cases, recognized the uniqueness of railroad operations, and the unfairness of requiring injured railroad employees to bring lawsuits only where the railroad is incorporated or at its principal place of business. The text and purpose of the law contemplated the due process concerns, and enacted the rights of employees in order to eliminate the necessity of courts from addressing these rights each time a case was filed.

The applicable jurisdictional statute is set forth at 45 U.S.C. § 56, which states:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the

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[7] We recognize the decision in *Walden v. Fiore*, 134 S. Ct. 1115 (2014) that focuses on the contacts of the defendant with the forum state. However, we believe that the fairness to all parties is relevant in determining due process.

United States under this chapter shall be concurrent with that of the several states.

Obviously, a statute cannot violate due process standards. However, in the present case, the statute encompasses due process because of the fairness imposed therein. A principal canon of statutory construction is that a statute will be given a constitutional interpretation when possible. *U. S. v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932); *U.S. v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). *See also, Statutory Interpretation: General Principles and Recent Trends, supra*, at 23.

The BNSF Railroad is, and was, continuously and systematically doing business within the jurisdiction of Montana at the time of commencement of this action. The railroad cannot validly dispute this fact. Moreover, the railroad receives substantial benefits from the state, and its burden of litigating within Montana is small. The legislative history of this section of the code emphasizes the congressional intent to protect the injured employee from the undue burden of forcing him/her to seek recovery in a court many miles away from the plaintiff's home. Fairness is reflected throughout the congressional consideration of 45 U.S.C. § 56, and meets the due process requirements.

III. THE LEGISLATIVE HISTORY OF 45 U.S.C. § 56 MAKES IT CLEAR THAT THE STATE'S TRIAL COURT IS VESTED WITH PERSONAL JURISDICTION IN THE PENDING CASE.

In 1910, both the House and Senate proposed amendments to the FELA which would allow plaintiffs to bring actions where the railroad defendant's

contacts within a state were continuous and systematic. The amendment proposed by the House Committee on the Judiciary contained different language than the Senate version. It provided that the lawsuit could be brought in the district of the residence of either the plaintiff or the defendant, or in which the cause of action arose, "or in which the defendant shall be found at the time of commencement of the action." H. R. Rep. No. 513, 61st Cong., 2d Sess. 2-3 (1910). The Committee said "So important a statute should be made so certain in its terms that the intent of Congress may be made manifest and clear." *Id.* at 6. It stated that the amendment is necessary "in order to avoid great inconvenience to suiters and to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an 'inhabitant'." *Ibid.* Further, it pointed out that

> . . .to permit it to be a practical barrier to the maintenance of an action for death or personal injuries of employees who may be presumed to be unable to meet the expense of presenting their case in a jurisdiction far from their homes would be an injustice too grave and serious to be longer permitted to exist.

Id. at 7.

On the present issue before this Court, the Senate Committee on the Judiciary proposed a minor change to the House version. That change was adopted by Congress in 45 U.S.C. § 56. It allows the lawsuit to be brought where the defendant railroad is "doing business", instead of the House version which permitted a lawsuit where the defendant is "found". S. Rep. No. 432, 61st Cong., 2d. Sess. 1 (1910). Also, the Committee

said that the issues have been so thoroughly covered and fully treated that it quoted and adopted fully the discussion in the House committee report. *Id.* at 3-4.

In the Senate floor deliberations, Senator William Borah, Chairman of the Senate Judiciary Committee, further explained the congressional intent:

> The objection which has been made to the existing law, and this objection arises by reason of the decision of some of the courts, is that the plaintiff may sometimes be compelled to go a great distance in order to have his cause of action against the defendant by reason of the fact that now the action must be brought in certain instances in the district in which the defendant is an inhabitant. In other words, the corporation being an inhabitant of the State which creates it, it might follow that the plaintiff would have to travel a long distance in order, under certain conditions, to bring his action against the defendant and come within the terms of the law. So, if this bill should be passed the law will be remedied in that respect, in enabling the plaintiff to bring his action where the cause of action arose or where the defendant may be doing business. *The bill enables the plaintiff to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so.*

45 Cong. Rec. 4034 (1910). (Emphasis added).

It follows from this history that a state has personal jurisdiction to allow a FELA plaintiff to sue a railroad wherever it does business. The decision in *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44, 50 (1941)

is worth repeating, where this Court approved the above language of Senator Borah in allowing the plaintiff to find the corporation at any point or place or state where it is actually carrying on business. *See also, Denver & Rio Grande Western R.R. v. Terte, supra,* 284 U.S. at 286.

While the statute itself does not specifically mention due process, the discussion reflects Congress' concern with due process. Congress granted jurisdiction to any court "in which the defendant shall be doing business at the time of commencing [an action under 45 U.S.C. § 51" because it understood the impediments to accessing the courts faced by FELA plaintiffs in view of the unique interstate nature of railroad employees work. The point of the congressional deliberations is that an employee should not be forced to bring a FELA case many miles away from his/her home.

The BNSF says that § 56 covers only subject matter jurisdiction, not personal jurisdiction. (Pet. Br. 34-40). This Court has never so ruled, and it had more than 100 years to do so in similar FELA cases. There was no need for Congress to specify personal jurisdiction and subject matter jurisdiction in the FELA law. The state of the law at the time of FELA's enactment was that a corporation could be sued in any forum where it owned property. *See, Pennoyer v. Neff,* 95 U.S. 714, 723-24 (1877)[8]; *See also,* Mary

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[8] This Court, in recent cases, has limited the holding of that case as it relates to jurisdiction generally. However, FELA jurisdiction, and congressional intent at the time of enactment should be the governing factor in the present case.

Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 614-15 (1988).

IV. THIS COURT HAS CONSISTENTLY EXAMINED A FEDERAL STATUTE WITH REFERENCE TO THE COMMON LAW AT THE TIME THE STATUTE WAS ENACTED.

The fact that the law as to personal jurisdiction in state courts may have changed over time should not have any impact on how the FELA is interpreted today. This Court should be guided by the law when FELA was enacted. Clearly, there was no intent by Congress to abrogate then existing law as to personal jurisdiction *sub silentio*. Congress relied upon the conditions that the courts had created at the time of FELA's enactment. As stated in *Perrin v. United States*, 444 U.S. 37, 42 (1979), this Court looks "to the ordinary meaning . . . at the time Congress enacted the statute . . . ." This Court has consistently examined a federal statute with reference to the common law at the time the statute was enacted. *Norfolk Southern Ry. v. Sorrell*, *supra*, 549 U.S. at 166 (2007); *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 164 (2003); *Consolidated Rail Corp. v. Gottshall*, *supra*, 512 U.S. at 542, 544; *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330, 336-339 (1988); *Urie v. Thompson*, 337 U. S. 163, 182 (1949). When words used in a statute had a well-settled judicial meaning at the time the statute was enacted, courts presume that the legislature intended to continue the existing interpretation in the statute absent contextual or historical evidence to the contrary. *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939); *The Abbotsford*, 98 U.S. 440, 444 (1878).

A fundamental canon of statutory construction is that ". . . unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014). In interpreting this section, the congressional intent to provide wide ranging liberal relief for railroad employees must be taken into account. Furthermore, the FELA authorizes a state to entertain a lawsuit, if the state law allows it. In *Mondue v. N.Y., New Haven & Hartford R.R. (Second Employers' Liability Cases)*, 223 U.S. 1, 59 (1912), this Court said ". . . rights arising under [the FELA] may be enforced, as of right, in the courts of States when their jurisdiction, as prescribed by local laws, is adequate to the occasion."

V. THIS COURT HAS APPROVED THE JURISDICTION PURSUANT TO 45 U.S.C. § 56, AND THIS COURT'S RECENT DECISIONS DO NOT NEGATE THOSE § 56 DECISIONS.

This Court has previously rejected the railroads' constitutional jurisdictional arguments under 45 U.S.C. § 56.[9] In *Baltimore & Ohio R.R. v. Kepner, supra*, this Court held that a railroad employee who was injured in Ohio could bring his FELA case in New York. It stated that 45 U.S.C. § 56 was "deliberately chosen to enable the plaintiff, . . . to find the corporation at any point or place or State where it is

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[9] These cases decided whether the forum chosen by the plaintiff created an undue burden on interstate commerce. There, this Court discussed the unfairness of requiring the plaintiffs to travel many miles to file a case.

actually carrying on business, and there lodge his action . . . ." *Id.* 314 U.S. at 50. In *Miles v. Illinois Central R.R.*, 315 U.S. 698, 702 (1942), this Court pointed out that a FELA lawsuit could be maintained where the railroad is actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction. In *Pope v. Atlantic Coast Line R.R* , 345 U.S. 379 (1953), this Court held that a Georgia resident injured in Georgia could maintain an action in Alabama. It emphasized that a plaintiff could bring an action wherever the railroad is doing business. [10]

BNSF has intentionally obtained various benefits from the state. It sought, and has, authorization to conduct business within the state; there is a BNSF registered agent in the state; it conducts extensive business within the state; it has the right to sue there; and maintains banking in Montana; it operates switching yards and classification yards in the state; it contracts to supply services within the state; purchases products in the state; and its marketing occurs within Montana by soliciting business through salespersons

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[10] In *Pope v. Atlantic Coast Line R.R.*, *Id.* at 386-87, the Court noted that, in 1947, Congress was considering changes to § 56 in view of the *Miles* and *Kepner* cases. The railroads asserted that, as the result of those decisions, the injured employees were left free to abuse their venue rights in distant forums without restriction. The pending bill would have permitted a lawsuit only in the district or county where the plaintiff resided or the accident occurred. The House passed an amendment which would have restricted a state court's jurisdiction. *See*, H.R. Rep. No. 613, 80th Cong., 1st Sess. (1947). However, the Senate Judiciary Committee rejected the amendment, and the proposal was not adopted.

and advertising. It has over 2,000 miles of track in the state, and employs more than 2,000 there. In short, the BNSF avails itself of numerous privileges and benefits within Montana. Because of the above, it should be considered a "home" of the BNSF. *See, Walden v. Fiori, supra,* 134 S. Ct. at 746, 761. BNSF is as much at home in Montana as it is in Texas.

The discussion in a lower court case is worth noting. In *Fraley v. Chesapeake & Ohio Ry.*, 294 F. Supp. 1193, 1203 (W.D. Pa. 1969), the court discussed the congressional intent in a FELA case of allowing venue where the defendant is doing business. It quoted from the *Kepner* and *Miles* cases in finding the legislative history indicates that Congress meant to enable suits to be brought wherever the railroad was operating. The court said that the railroad was not merely soliciting business, but actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction, and Congress felt that a plaintiff should be able to sue in any place served by the railroad. Further, the *Fraley* court said that railroads are often multistate corporations operating lengthy rail lines (as is the BNSF in the present case), and this was deemed an undue hardship upon a plaintiff. The court concluded that the plaintiff should be allowed to bring suit wherever rail operations were being conducted.

The BNSF primarily relies upon *Daimler, supra,* and *Goodyear Dunlop Tries Operations, S.A. v. Brown, supra,* to challenge the trial court's jurisdiction in the present case. Those cases are clearly distinguishable on the facts. There, this Court noted that the contacts with the state in each case were too

sporadic (*Goodyear*, *Id.* at 2857), or not so continuous and systematic as to be at home (*Daimler*, *supra*, 134 S. Ct. at 749). In both cases, the defendants were essentially absent from the forum. That certainly is not the true in the present case.

Congress specifically enacted the jurisdiction and venue in FELA litigation. And, as discussed *supra*, at____, as it relates to personal jurisdiction, this Court has approved the validity of 45 U.S.C. § 56. Neither *Daimler* nor *Goodyear* write a new chapter in judicial history, nor did it modify the historic authority of allowing injured railroad employees to enforce their federal FELA rights in courts other than where the railroad is incorporated or has its principal place of business. *See, The Supreme Court, 2013 Term—Leading Cases*, 128 Harv. L. Rev. 311, 316 (Nov. 10, 2014).

The underlying premise of both *Daimler and Goodyear* is that constitutional due process is *fairness*. Certainly, fairness in the present case dictates that the state's trial court retain jurisdiction. Throughout the years, this Court has consistently recognized the importance that Congress attributed to balancing the inequality of the railroads over the employees. In *Lilly v. Grand Trunk Western R.R.*, 317 U.S. 481, 486 (1943), it stated that the Act: ". . . is to be liberally construed in the light of its prime purpose, the protection of employees and others." In *Urie v. Thompson*, 337 U.S. 163, 181-182 (1949), it pointed out FELA's ". . . remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court." In *Consolidated Rail Corporation v. Gottshall*, *supra*, 512 U.S. at 542 , it cited the congressional effort in the FELA

to ". . . shift part of the human overhead of doing business from employees to their employers." Also, this Court, once again, recognized Congress' "humanitarian" and "remedial" goals. *Id.* at 542-543, cited, with approval, in *CSX Transportation, Inc. v. McBride*, 564 U.S. 685, 692 (2011).

CONCLUSION

The decision of the Supreme Court of Montana should be affirmed.

Respectfully Submitted,

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